

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

JAN 14 2008

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2007-0211-PR
)	DEPARTMENT B
v.)	
)	<u>MEMORANDUM DECISION</u>
DENNIS DUANE WALSH,)	Not for Publication
)	Rule 111, Rules of
Petitioner.)	the Supreme Court
)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR-20050088 and CR-20050089

Honorable Kenneth Lee, Judge

REVIEW GRANTED; RELIEF GRANTED

Law Offices of Thomas Jacobs
By Thomas Jacobs

Tucson
Attorney for Petitioner

E S P I N O S A, Judge.

¶1 Petitioner Dennis Duane Walsh challenges the trial court's denial of his petition for post-conviction relief. We grant review and relief.

¶2 Walsh was charged in two indictments with multiple crimes. The first two counts in CR-20050089 were severed for trial, and a jury found him guilty of both. Before the trial court entered a judgment of conviction on those offenses, however, Walsh pled

guilty to all remaining counts in both indictments: ten counts of armed robbery, one count of attempted armed robbery, six counts of aggravated assault with a deadly weapon or dangerous instrument, eight counts of robbery, and one count of attempted robbery. Walsh also admitted having been previously convicted of four felonies, not including the two counts that had been severed for trial, and that one of his prior convictions, aggravated assault with a deadly weapon or dangerous instrument, constituted a serious offense. *See* A.R.S. § 13-604(W)(4).

¶3 At sentencing on all counts following the change of plea, the state moved to dismiss the first two counts in CR-20050089. The court granted the motion and sentenced Walsh on the remaining counts in both cases,¹ imposing concurrent sentences on all convictions. Pursuant to A.R.S. § 13-604(S), it sentenced Walsh to life in prison without the possibility of parole for twenty-five years on each count of armed robbery and aggravated assault. It imposed aggravated terms of six to twenty-five years in prison on the remaining counts.

¶4 Walsh timely filed a petition for post-conviction relief, in which he asserted that § 13-604(S) did not apply to his convictions “because all of the offenses in these cases constituted a continuous ‘spree’ associated with [his] heroin[] addiction.” He contended that §13-604(M) thus required considering his offenses as one conviction for sentencing

¹At the time of sentencing, Walsh’s motion for new trial on counts one and two in CR-20050089 was still pending. Walsh had asserted in the motion that, because of his prior convictions, he had been exposed to a sentence of thirty years or more on those counts and, therefore, had been improperly tried by an eight-person jury. *See* Ariz. Const. art. II, § 23; A.R.S. § 21-102(A).

purposes. He also argued his life sentences were excessive and constituted cruel and unusual punishment. The trial court summarily denied relief after it determined that the offenses were not spree offenses and that the punishment was warranted given Walsh's crimes and what the trial court concluded were statutorily mandated life sentences.

¶5 “We ‘review a trial court’s denial of post-conviction relief for an abuse of discretion,’” which includes an error of law. *State v. Gonzalez*, 216 Ariz. 11, ¶ 2, 162 P.2d 650, 651 (App. 2007), *quoting State v. Decenzo*, 199 Ariz. 355, ¶ 2, 18 P.3d 149, 150 (App. 2001); *see also State v. Rubiano*, 214 Ariz. 184, ¶ 5, 150 P.3d 271, 272 (App. 2007). Applying an incorrect sentencing statute constitutes legal error. *Gonzalez*, 216 Ariz. 11, ¶ 2, 162 P.2d at 651. And “[i]mposition of an illegal sentence is fundamental error.” *Id.*; *see also State v. Thues*, 203 Ariz. 339, ¶ 4, 54 P.3d 368, 369 (App. 2002). We conclude that, although the trial court committed no error in finding Walsh’s offenses were not spree offenses, Walsh was nonetheless sentenced under an inapplicable statute.

¶6 Section 13-604(S) did not apply to Walsh’s convictions because, at the time of sentencing, he had only one previous conviction for a serious offense.² Section 13-604(S) provides:

A person . . . who stands convicted of a serious offense except a drug offense, first degree murder or any dangerous crime against children, whether a completed or preparatory offense, and who has *previously been convicted of two or more serious*

²As earlier noted, at his change of plea, Walsh admitted that one of his prior convictions was a serious offense. The state has not directed us to, nor have we found, evidence in the record that any other of Walsh’s prior convictions constituted a serious offense under A.R.S. § 13-604(W)(4).

offenses not committed on the same occasion shall be sentenced to life imprisonment and is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis except as specifically authorized by § 31-233, subsection A or B until the person has served not less than twenty-five years or the sentence is commuted.

Id. (emphasis added). Walsh was convicted of the offenses in CR-20050088 and CR-20050089 simultaneously. *See State v. Thompson*, 200 Ariz. 439, ¶ 7, 27 P.3d 796, 798 (2001) (“One is convicted when there has been a determination of guilt by verdict, finding, or the acceptance of a plea.”). Therefore, whether these offenses can be considered spree offenses or not, none of them is a previous conviction to any other. *See id.* ¶ 6; *State v. Ofstedahl*, 208 Ariz. 406, ¶¶ 5-7, 93 P.3d 1122, 1123-24 (App. 2004). Because Walsh had previously been convicted of only one serious offense, § 13-604(S) did not apply. Walsh must be resentenced under the appropriate sentencing statute.

¶7 We address Walsh’s claim that his offenses were spree offenses because the issue is relevant to his resentencing. He contended in his petition for post-conviction relief that his offenses, although committed on multiple dates, should be deemed committed on the same occasion because they constituted one continuous criminal spree. In a detailed analysis citing *State v. Henry*, 152 Ariz. 608, 734 P.2d 93 (1987), the trial court found the offenses were not spree offenses. In *Henry*, our supreme court held that, although there is no “all-encompassing test to determine whether different crimes” were committed on the “‘same occasion’ . . . [a]ny analysis of the question must have reference to the time, place, number of victims, and distinct nature of the defendant’s acts.” *Id.* at 612, 734 P.2d at 97.

¶8 Here, the trial court considered the facts that Walsh’s offenses were committed on multiple occasions in October and December 2004, involved multiple victims, and were connected only by Walsh’s common motive to obtain money for drugs. Under these circumstances, the trial court did not err in finding that Walsh’s offenses were not spree offenses and had not been committed on the same occasion. *Cf. State v. Derello*, 199 Ariz. 435, ¶ 8, 18 P.3d 1234, 1236 (App. 2001) (whether trial court correctly determined prior offenses were committed on same occasion reviewed de novo).

¶9 Section 13-702.02, A.R.S., applies to “multiple offenses not committed on the same occasion.” Section 13-702.02(A) provides:

A person who is convicted of two or more felony offenses that were not committed on the same occasion but that either are consolidated for trial purposes or are not historical prior felony convictions as defined in § 13-604 shall be sentenced, for the second or subsequent offense, pursuant to this section.

Because we agree with the trial court that Walsh’s offenses were not spree offenses, we conclude § 13-702.02 is the sentencing statute applicable to Walsh’s offenses. “[T]he clear lesson from *Thompson* is that § 13-702.02 is the applicable sentencing statute for cases . . . in which multiple prosecutions are resolved through a comprehensive plea agreement and all pleas are entered at the same time.” *Ofstedahl*, 208 Ariz. 406, ¶ 6, 93 P.3d at 1124. Although Walsh’s pleas were not entered pursuant to a plea agreement, they were entered at the same time; therefore, § 13-702.02 is equally applicable.

¶10 Because we have found Walsh’s life sentences illegal, we need not address his contention that they also constituted cruel and unusual punishment. Walsh’s petition for

review is granted. We affirm Walsh's convictions but vacate Walsh's life sentences and remand this case for resentencing consistent with this decision.³ Walsh's remaining sentences are affirmed.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge

³We note the trial court ruled only that all of Walsh's offenses could not be considered spree offenses. The trial court was not asked to determine whether some of Walsh's offenses, which were committed on the same date and at the same time, were committed on the same occasion. The trial court will necessarily make that determination at resentencing in applying the provisions of § 13-702.02.